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No. 84-1559

In The
SUPREME COURT OF THE
UNITED STATES

October Term, 1984

UNITED VAN LINES, INC.,

Petitioner,

vs.

JAMES K.T. HUNTER and
GINA F. BRANDT,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF AUTHORITIES

Case:

Allis-Chalmers Corporation v. Loueck (No. 83-1748) ____U.S.____, ____S.Ct.____, ____L.Ed.2d____ . . 1-9

I

THE NINTH CIRCUIT SHOULD NOT BE DIRECTED TO RECONSIDER THE OPINION BELOW IN LIGHT OF ALLIS-CHALMERS

It is self evident that this Court should not direct the Ninth Circuit to reconsider the opinion below in light of Allis-Chalmers Corporation v. Loueck (No. 83-1748) ("Allis-Chalmers") in the absence of any patent or latent inconsistency between those opinions. In determining if such an inconsistency exists, two potential impacts of Allis-Chalmers on the issues presented in the action below appear -- namely:

1. the state law claim for tortious bad faith may be determined to be preempted by federal law; and

2. federal common law may be determined to provide a remedy for tortious bad faith.

While these potential impacts admittedly would be extremely significant to the substantive issues presented by this action, a review of the opinion below establishes that neither impact would create any patent or latent inconsistency with the ruling on the jurisdictional issue decided in the opinion below. Thus, the opinion below expressly provides that its ruling on the jurisdictional issue is independent of the ultimate resolution of either of the substantive issues potentially impacted by Allis-Chalmers.

More particularly, in Part I of the opinion below, the Ninth Circuit held that federal jurisdiction over this action was lacking regardless of whether Respondents' "state-law" claims were preempted by federal law since "the federal claim appears by way of defense". Petition, A-11. Thus, the determination

that Respondents' "state-law" claims are preempted by federal law is irrelevant to the Ninth Circuit's determination of the jurisdictional issue.

With respect to whether federal common law in fact replaces state law by providing a remedy for tortious bad faith, that determination, if made by the Ninth Circuit, would have been relevant to the Ninth Circuit's discussion of jurisdiction based on artful pleading. Petition, A-12 through A-20. Yet the Ninth Circuit held that the issue of the existence of a federal common law remedy was not raised in the specific circumstances of this case because Defendants below "failed to argue, let alone demonstrate, that federal law affords Plaintiffs a remedy for the injuries they claim they suffered". Petition, A-19. See also Petition, A-19, fn. 5.

In sum, this Court's recent decision in Allis-Chalmers arguably would have warranted a direction to the Ninth Circuit for the reconsideration of the opinion below if that opinion had purported to determine either of the substantive issues heretofore discussed. The opinion below, however, does not so purport. To the contrary, it holds that in light of the specific, unique circumstances presented below, neither of those substantive issues required or merited resolution in connection with the Ninth Circuit's determination of the jurisdictional issue. While this Court may disagree with this holding of the Ninth Circuit, such holding is not in any manner impacted by the decision in Allis-Chalmers, and, accordingly, no purpose would be served by directing the Ninth Circuit to reconsider the opinion below in light of Allis-Chalmers. Quite

simply, since the opinion below is premised on its holdings that the substantive issues are irrelevant to the determination of the jurisdictional issue therein decided, no purpose would be served by ordering the reconsideration of that opinion in light of an opinion which does not even purport to address such holdings, but merely addresses the "irrelevant" substantive issues.

II

THIS COURT SHOULD NOT GRANT THE PETITION FOR CERTIORARI

The same factors which dictate that this Court should not direct the Ninth Circuit to reconsider the opinion below in light of Allis-Chalmers similarly dictate this Court's denial of the Petition. Thus, by virtue of the unique facts bearing on the jurisdictional issue presented below, the opinion below is in no sense contradicted by Allis-Chalmers.

Nor would this Court's review of the opinion below present a proper vehicle for this Court's determination of either of the substantive issues arguably impacted by Allis-Chalmers. With regard to the federal preemption issue, the Ninth Circuit is clearly correct in deciding that that issue need not, and should not, be determined in the context of the preliminary jurisdictional issue.

With regard to the federal common law issue, the Ninth Circuit properly determined that Petitioner's (and all other parties') failure to argue that such a remedy existed in support of removal jurisdiction relieved that Court of the responsibility for sua sponte analyzing and determining this issue. If the parties with the burden of sustaining removal "jurisdiction" fail to contend that federal common law displaces state law, the courts should

not have the unilateral obligation in the absence of any request or guidance by the parties to raise and decide an important and novel constitutional issue. In any event, even if this determination by the Ninth Circuit were erroneous, such determination is not contradicted by any decision of this Court, is not in conflict with the decision of any other Court of Appeals and is not itself sufficiently important to merit the attention of this Court.

Furthermore, even if this Court disagrees with the Ninth Circuit's decision not to consider and determine the federal common law issue, this case does not constitute a proper vehicle for this Court to determine that issue. Since none of the parties or lower courts addressed, much less determined, the federal common law issue below, this Court should await the arrival of a case

wherein such issue is so addressed before considering it.

Indeed, in light of Allis-Chalmers, it is inevitable that carriers and/or shippers will be addressing the federal common law issue in the future, both with respect to the jurisdictional and substantive issues.[1] There simply is no adequate rationale for deciding the substantive issues raised by Allis-Chalmers in the context of this case as opposed to awaiting the more appropriate cases to come -- particularly when the

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[1] In fact, when and if this case is remanded to state court, Respondents will argue that federal common law provides an alternative basis for carrier liability for tortious bad faith in the event state law is preempted from providing such a remedy.

case law may develop in a manner which will moot the necessity for intervention by this Court.

III

CONCLUSION

At first glance, the issues addressed in Allis-Chalmers and in the opinion below appear strikingly similar. Yet a closer analysis of those issues establishes the existence of crucial differences between the substantive and jurisdictional issues therein addressed. These differences dictate not only the denial of the Petition, but also the refusal to direct Ninth Circuit's reconsideration of the opinion below in light of Allis-Chalmers.

DATED: June 11, 1985

Respectfully submitted,

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